

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

77-6119

ORIGINAL

To be argued by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BERALDINE L. ACHA and ARLENE M. EGAN, each
individually and on behalf of all others
similarly situated,



Plaintiffs-Appellants,

-against-

ABRAHAM D. BEAME, individually and in his
capacity as Mayor of the City of New York,
MICHAEL J. CODD, individually and in his
capacity as Police Commissioner of the
New York City Police Department and THE
CITY OF NEW YORK, as a public employer,

Defendants-Appellees.

On Appeal from the United States District Court for
The Southern District of New York

APPELLEES' BRIEF IN RESPONSE
TO BRIEF OF AMICUS CURIAE

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Statement

On October 4, 1977, defendants-appellees belatedly were served with the Brief of the Equal Employment Opportunity Commission as Amicus Curiae. In view of the fact that the arguments set forth therein raise matters substantially different from those raised by appellants, we respectfully submit a brief response thereto.

The Equal Employment Opportunity Commission (hereafter "EEOC") argues that the order of the District Court dated July 28, 1977 was in error in two respects: (1) relief under Title VII should not be limited to those class members who were the victims of hiring discrimination within three

hundred days prior to the filing of charges in the EEOC by the named plaintiffs on June 25, 1975; and (2) relief should be available prior to the effective date of Title VII to remedy discrimination which occurred prior to March 24, 1972. The first argument of the EEOC is premised entirely upon the contention that plaintiffs have alleged a continuing policy of the defendants of excluding women from the positions and opportunities afforded males in the Police Department. This "policy" allegedly commenced with the administration of sex-segregated examinations until 1970 and was continued by and through the layoffs. Therefore, the EEOC concludes that any discriminatory acts which constituted part of that policy are remediable so long as timely charges with the EEOC were filed from the last act of discrimination.

The second argument is similar to an argument already posited by appellants. The EEOC contends that because 42 U.S.C §1983 was applicable to municipalities long prior to 1972, relief under Title VII should not be limited to the effective date of Title VII. The argument is merely a veiled manner of saying that pre-act discrimination is remediable under Title VII. We have already fully briefed the analogous argument made by appellants, at pp. 38-40 of Appellees' Brief. Therefore, this contention of the EEOC will require little further discussion.

Facts

For two years, this litigation proceeded upon the theory that the layoffs pursuant to section 80 of the New York Civil Service Law of female police officers were discriminatory because they perpetuated defendants' pre-Title VII allegedly discriminatory hiring practices. The only allegations of discrimination set forth by plaintiffs or argued by the EEOC both in the District Court and in this Court on the original appeal were that through 1969, plaintiffs were not permitted to take examinations for Patrolman or Police Trainee. They alleged that had they been able to take such examinations, they would have been appointed at an earlier date and accrued sufficient seniority to withstand the layoffs in June, 1975. Plaintiffs did not allege either in the charges filed with the EEOC in June 1975 or in their complaint or amended complaint that defendants maintained any other discriminatory policy. They did not allege that, once they were appointed in 1973, they were the victims of any type of discrimination. In fact, they alleged that the positions of Patrolman and Policewoman were merged in January, 1973. It was upon those allegations that this court reversed the initial dismissal of the complaint by the District Court, Acha v. Beame, 531 F. 2d 648 (2d Cir. 1976), and the District Court subsequently entered a partial summary judgment on August 4, 1976 on behalf of 38 class members. Additionally, it was only upon those allegations that the

Special Master conducted hearings on the claims of approximately 150 class members.

However, upon defendants' motion to vacate the partial summary judgment entered August 4, 1976, plaintiffs alleged entirely new acts of discrimination which substantially controverted their allegations before the EEOC and in the original and amended complaint. In Appellees' Brief submitted to this Court on September 26, 1977, we attempted to avoid a detailed refutation of the new factual allegations except to indicate that the District Court found that they raised factual disputes and therefore referred them for trial. Specifically, the District Court left open plaintiffs' allegations that: (1) in 1973, qualified class members were hired after men who had lower test scores; and (2) the positions of policewoman and patrolman were not merged in 1973 and therefore it was improper under Section 80 of the Civil Service Law and discriminatory to use a unified seniority list including both males and females to determine the order of layoff in June, 1975. Thus, to the extent that Appellants' Brief relied on those allegations to avoid the application herein of the recent decisions of the Supreme Court in International Brotherhood of Teamsters v. United States, ____ U.S. ____, 97 S. Ct. 1843 (1977) and United Air Lines v. Evans, ____ 97 S. Ct. 1885 (1977), those allegations must first be litigated in the District Court. They are not relevant to whether the District Court properly vacated the partial summary judgment

which was based solely upon the facts set forth in the original original complaint and a theory which is no longer valid under the Supreme Court decisions.

The brief submitted by the EEOC now forces us to burden this Court with a closer examination of the record in this case. While appellants relied on these new allegations in their brief, such allegations were submitted only in support of their contention that plaintiffs were the victims of discrimination both in hiring and in their lay-off. The EEOC, a non-party to this suit, however, has adopted those allegations and, for the first time, alleges that they amount to an allegation of a continuing policy of exclusion of women from the duties and opportunities afforded to men in the Police Department.* The Brief of the EEOC is based upon fantasy rather than fact. It is so far removed from the reality of this case that it amounts to a request for an advisory opinion from this Court upon a hypothetical set of facts. Given the ingenuity and resourcefulness of appellants, it is doubtful that they would have omitted to argue a continuing policy of discrimination unless it was entirely without merit.

Additionally, since the District Court has not had had an opportunity to consider the questions raised by the

*It should be noted that the EEOC submitted a brief to the District Court in opposition to defendants' motion to vacate the partial summary judgment and were further permitted to argue at the hearing on the motion. The EEOC never submitted to the District Court its new theory concerning this discriminatory "policy."

allegations of a continuously policy of discrimination, it would be premature for this Court to review the issue. Appellants could apply to the District Court for an amendment of its order of July 28, 1977 in light of this new allegation.

The new factual allegations set forth by plaintiffs and adopted by the EEOC are premised upon the most meager bits of "evidence" which have either been controverted by defendants or which constitute an exaltation of form over substance. Each of these bits of "evidence" are used by the EEOC in support of their allegation of continuing discriminatory policy as opposed to plaintiffs' allegations of discrete acts of discrimination in hiring and layoff. Each is discussed separately below.

(1) Appellants and the EEOC allege that the positions of Patrolman and Policewoman were never merged for budgetary purposes. They cite in support thereof a stipulation by an attorney for the Police Department at the hearing before the District Court on June 30, 1975 on plaintiffs' motion for a preliminary injunction (A. 84).

At the hearing on defendants' motion to vacate partial summary judgment, defendants submitted to Judge Duffy documentary evidence which controverts that stipulation which was an apparent error by the attorney (AD 67-68).

(2) Appellants and the EEOC allege that the positions of Patrolman and Policewoman were only merged

into the position of Police Officer for certain internal purposes in 1973, but were, in fact, substantially different positions. In support of this contention (which is contrary to their allegations in the complaint and amended complaint), they introduced: (a) the affidavit of a class member, Maureen Kempton, that when she was appointed, she received an identification card labelled "Policewoman," and she only received a "Police Officer" identification card in 1975, shortly before the layoffs. The affidavit further stated that Ms. Kempton competed only with other women for vacation selection (A. 536-38); (b) a finding of probable cause by the New York City Commission on Human Rights on April 8, 1977, regarding matron duty in the Police Department (AD. 12, 89-90, 107-11); (c) a computer printout from the Comptroller's office dated June 30, 1975, identifying separate titles of Policewoman and Patrolman (AD. 37-39), and the separate titles set forth in the Administrative Code.

Plaintiffs and the EEOC ignore the fact that all women appointed beginning in January, 1973--the entire plaintiff class--were given training, qualifying examinations, assignments and promotional opportunities identical to that given to males (A. 17, 49, 52, 57, 68, 123, 154, 486, 542, 584). The positions of Policewoman and Patrolman were merged without qualification by order of the Police Commissioner in April, 1973 (A. 486, AD. 69-70). A "unisex" examination was administered in December, 1973 (the first examination given

since 1970) with appointments therefrom to be made without regard to sex (A.270-71, 487). Between the end of 1973 and the beginning of 1975, no new identification cards were issued because of administrative delays. Therefore, Ms. Kempton retained her old card during that period as did every other officer, male and female. All officers compete for vacation selection within their squad. In those instances where a female officer is also assigned matron duty, she will compete with other women so assigned in order to ensure adequate coverage (A.547). In general, competition against other female officers based on seniority is to the advantage of the female officer (A. 547).

Plaintiffs and the EEOC further choose to ignore the fact that the finding of probable cause by the City Commission on Human Rights was predicated solely on events following the layoffs in June, 1975 and are not related to the period in question here. A finding of probable cause is not an adjudication on the merits. Indeed, the City Commission is currently conducting hearings on the complaint.* Until recently, the Administrative Code of the City of New

*The matron duty complaint is simply not part of the instant action. If it were, the City Commission on Human Rights would not have jurisdiction to proceed (Admin. Code §81-11.0). Counsel for plaintiffs herein also represent the complainants before the City Commission. The complaint was filed with the City Commission after this suit was commenced.

Furthermore, no allegation concerning the performance of matron duty was contained in the complaints of plaintiffs Acha and Egan filed with the EEOC in June, 1975 upon which jurisdiction under Title VII in this action is predicated. Nor have plaintiffs herein requested any relief based upon the matron duty complaint.

York mandated that female officers perform matron duty. Male officers were similarly required to guard and search male prisoners. The law was recently amended to permit female civilians to perform matron duty for female prisoners (Admin. Code §434a-27.01-28.9, as amended by Local Law No. 42, June 9, 1977) and the Police Department is in the process of conducting pre-appointment investigations of applicants for the position.

Finally, the Supreme Court of the State of New York has found, upon facts identical to those alleged before the City Commission, that the matron duty requirement was not discriminatory nor arbitrary and capricious. Crowe v. Codd, Index No. 7796/76 (Sup. Ct. N.Y. Co., Oct. 28, 1976) (Sutton, J.) (A. 544).

(3) Additionally, plaintiffs and the EEOC have alleged that the use of sex-segregated lists for hiring in 1973 and 1974 was itself discriminatory against women and resulted in the appointment of only 513 women during that period as compared with 4,236 men (A.576).

In the first instance, the mere use of sex-segregated lists (resulting from pre-1972 examinations) did not by itself injure the plaintiff class members since they were appointed from those lists. No quota was imposed on the hiring of women in 1973 and 1974. Rather, every eligible and qualified woman on the list was appointed during that period. Furthermore, the women were given priority in 1973 which resulted in the appointment of more than 200 women

from List No. 9081 before any male was appointed from the comparable List No. 9080, or from the subsequent list based on Examination No. 0013 given in 1970. All other lists from which appointments were made in 1973 were based on examinations given prior to Nos. 9081 and 9080 (A. 486, 542, 543-50; AD. 59-62). The life of each of those lists had been extended by virtue of litigation brought by counsel for plaintiffs herein in the Supreme Court of the State of New York. Kirton v. Bronstein, et al., Index No. 1985/72 (November, 1972) (Waltemade, J.).

Therefore, the argument of the EEOC founded upon a policy of excluding women from the position of patrolman is a complete perversion of the facts in this case. They urge a continuous policy of discrimination against women which spans the tenure of several different mayors and police commissioners comparable to a conspiracy theory which culminated in the layoffs of female police officers in a deliberate attempt to prevent them from performing the duties of patrolman. The EEOC has taken upon itself to make allegations in this litigation to which it is not a party and which are not raised or argued by plaintiffs.

As even appellants recognized, this case challenges only the separate and discrete hiring and layoffs of female police officers. The partial summary judgment entered by the District Court on August 4, 1976 was premised solely on the allegations in the complaint that the layoffs pursuant to section 80 of the Civil Service Law were discriminatory

in that they perpetuated the effect of the allegedly discriminatory exclusion of women from examinations for appointment to the Police Department until 1969 when plaintiffs took Examination No. 9081. The recent decisions of the Supreme Court in Teamsters and Evans mandated that that judgment be vacated, and the injunctions modified. The meager evidence submitted by plaintiffs to the District Court as outlined above was clearly insufficient to grant injunctive relief to the additional eleven class members who were found by the Special Master to have been the victims of discrimination prior to 1969.

ARGUMENT

NEITHER PRE-ACT DISCRIMINATION NOR
DISCRIMINATION WHICH OCCURRED MORE
THAN 300 DAYS PRIOR TO JUNE 25, 1975
IS REMEDIABLE UNDER TITLE VII.

The EEOC contends that acts of discrimination which occurred more than 300 days prior to June 25, 1975 are not barred in this case because such acts were part of a continuing discriminatory policy. They further argue that even acts which occurred prior to the effective date of Title VII are actionable since such acts were discriminatory under 42 U.S.C. §1983 at the time they occurred.

(1)

The argument of the EEOC that plaintiffs are not barred by the 300 day statute of limitations is premised upon their fanciful view of the facts herein and is buttressed by an equally fanciful construction of the decision of the Supreme Court in International Brotherhood of Teamsters v. United States, _____ U.S. _____, 97 S. Ct. 1843 (1977).

In the first instance, it should be noted that the EEOC omits to discuss the facts of the cases cited in support of the argument that the statute of limitations does not bar acts which are part of a continuing discriminatory policy (Amicus Brief at pg. 24).

In Wetzel v. Liberty Mutual Insurance Co., 508 F. 2d 239, (3d Cir.), cert. den. 421 U.S. 101 (1975), plaintiffs alleged that defendant maintained a policy, which continued to the filing of charges with the EEOC, of limiting women to certain jobs both on

the incoming and promotional levels. Both plaintiffs had sought jobs which were limited to males and carried better salaries and were refused such positions. They apparently filed timely charges based on the refusal of their applications. The Court held since the policies alleged continued to the filing of charges, the claims of all present employees were timely and therefore such employees could be represented by the named plaintiffs in a class action.

Similarly, in Rich v. Martin Marietta Corp., 522 F. 2d 333 (10th Cir. 1975), plaintiffs challenged as discriminatory defendant's entire promotion system which continued to the date they filed charges in the EEOC and which caused them to be refused promotions until that date although they were allegedly qualified for the promotions. The Court held that the nature of the promotion system and the time of the occurrence of promotions is substantially different from a refusal to hire and therefore not barred by the statute of limitations as discussed in Mc Donnell-Douglas v. Green, 411 U.S. 792 (1973). Rich v. Martin Marietta Corp., 522 F. 2d at 348, fn. 15.

Neither case is even arguably apposite on the facts herein. Each involved a challenge to a single discriminatory policy rather than, as here, discrete, individual incidents of alleged discrimination separated by large blocs of time. As recognized by plaintiffs herein, two discrete acts are challenged -- the hiring practices until 1973 when the plaintiffs were employed and the layoffs in June, 1975. The two year

gap is unaccounted for by the EEOC except to assert that female officers continued to have "Policewoman" identification cards and the Comptroller's office and the Administrative Code continued to separately identify "Patrolmen" and Police-women."* During that two year period, women were given the same salary, training, assignments and promotional opportunities available to men. Therefore, the District Court correctly concluded that acts of discrimination which occurred more than 300 days prior to the filing of charges in the EEOC are barred by the statute of limitations.

The EEOC then boldly states that [i]n Teamsters the Court recognized that the policy of excluding blacks from over the road positions constituted a continuing violation." (Amicus Brief at pg. 25). In support of its contention, the EEOC cites two footnotes in Teamsters, 97 S. Ct. at 1868, n. 49 and 97 St. Ct. at 1873, n. 58.

While the policy alleged in Teamsters may have continued beyond the effective date of the Act, the Court made very clear that only those who could prove they had been injured after the effective date of the Act had a claim under Title VII. Thus, a pre - 1965 job applicant who could prove neither that

*The matron duty allegation, as discussed earlier, is premised upon a finding of probable cause by the City Commission on Human Rights and involves statistics and facts which occurred after the layoffs in June, 1975.

he had reapplied after 1965 nor that he was deterred from reapplying after 1965, was not entitled to any relief. Those who were the victims of post-act discrimination had a claim for relief for such post-act violations. The Court's holding that relief for post-Act discrimination was limited to the effective date of the Act, 97 S. Ct. at 1865, clearly precludes recovery for pre-Act pre-Act discrimination, even though the discriminatory policy continued thereafter.*

The Court in Evans then held unequivocally that discriminatory acts which occurred prior to the statute of limitations period were the "legal equivalent" of the acts which occurred prior to the passage of Title VII. 97 S. Ct. at 1889. Such acts may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue," 97 S. Ct. at 1889, but they are not actionable.

*The argument of the EEOC that the Court in Teamsters recognized a continuing policy appears to be without point. The Supreme Court in Hazelwood School District v. United States, 45 U.S. L.W. 4882 (June 27, 1977), a public employment case, also recognized the possibility of continuing policy. It, like Teamsters, held that plaintiffs must prove the existence of a continuing violation after the effective date of the Act. Proof that pre-Act hiring practices continued to have an effect after the date of the Act constituted relevant background information but did not set forth a violation of Title VII.

We note that the misconstruction of the Teamsters decision by the EEOC appears as desperate as the argument by appellants in their Reply Brief that Teamsters and Cates v. Trans World Airlines, Slip Op. 5127, Dkt. No. 76-7420 (2d Cir., August 5, 1977) are distinguishable from Acha. They contend that those cases involved challenges a bona fide seniority system which perpetuated prior discrimination as opposed to this case in which plaintiffs purportedly challenge the discriminatory impact caused by a bona fide seniority system which perpetuated prior discrimination.

Thus, even if plaintiffs could demonstrate a continuing policy, they must demonstrate injury from that policy both after the effective date of the Act and within the statute of limitations period. Relief is only available for a timely claim of injury.

Of course, however, the facts herein bely any allegation of a continuing policy of excluding women from job opportunities in the Police Department. When plaintiffs were hired in 1973, they were afforded the same training, opportunities and assignments as men in the Department. Thus, it is difficult to conceive of a continuous policy resulting in the June, 1975 layoffs which has a 2 1/2 year gap of equality in its midst.

(2)

The EEOC next contends that pre-Act discrimination is remediable under Title VII since discrimination by public employers was always illegal under 42 U.S.C. § 1983. Like appellants, the EEOC has cited no cases in support of this position.

The suggested ex post facto application of Title VII has already been rejected by this Court in Monell v. Department of Social Services of the City of New York, 532 F. 2d 259 (2d Cir. 1976), cert. granted on other grounds 45 U.S.L.W. 3508 (Jan. 25, 1977). The petition for certiorari requested review of the holding of this Court on the retroactivity of the 1972 Title VII amendment. That part of the petition was denied.

Nothing in the legislative history of the 1972 amendment points to a different result. Had Congress intended retroactive application of the amendment, thus diminishing vested seniority rights of other employees, they presumably would have been more specific. It is doubtful that they intended to grant to public employees less protection of their vested seniority rights than they extended to private employees in 1965. If they were not concerned with the vested rights of public employees there would have been no reason to extend the §703(h) exemption to municipalities.

Finally, the argument ignores the decision of the Supreme Court in Evans. If acts which were discriminatory under Title VII itself may be barred by the statute of limitations, then certainly acts which occurred prior to the passage of Title VII but which may have been unlawful under a separate statute are certainly barred. Of course, plaintiffs could have brought a timely action under 42 U.S.C. §1983 based on pre-Act discrimination. They did not and cannot now be relieved of that choice under a bifurcated construction of Title VII.

(3)

It should be reiterated at this point that the issue on this appeal is whether the District Court erred in modifying and denying injunctive relief previously granted and now requested by plaintiffs. That issue solely hinges on whether the partial summary judgment was properly vacated in view of the decisions of the Supreme Court in Teamsters and Evans. The

bulk of the arguments presented by the EEOC do not pertain to that issue and were not, in the first instance presented to the District Court. It would, therefore, be as premature and inappropriate for this Court to consider the contentions of the EEOC as it would for this Court to consider appellants' factual arguments on which the District Court has reserved decision until after a trial where the plaintiffs, for the first time in this case, will be required to prove their allegations.

CONCLUSION

The order appealed from should be affirmed, with costs.

October 12, 1977

Respectfully submitted,

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L. KEVIN SHERIDAN,
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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Jeffrey Bentzen

being duly sworn, says that on the 11 day of OCT., 1977, he served the annexed APP. BRIEF upon

ABNER W. SIBAL Esq., ~~the attorney for the~~ AMICUS CURIAE

herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 2401 E. STREET, N.W. in ~~the~~ WASHINGTON, D.C. ~~City of New York~~, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

11 day of OCT., 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Jeffrey Bentzen

Form 323-60M-1126054(77) 346

321-1M-421040(53)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

BRIAN SUGDEN

being duly sworn, says, that on the 11 day of OCT., 1977

at No. 666 - 3RD AVE in the Borough of MANH. in The City of New York, he served three copies

of the annexed APP. BRIEF upon MURRAY A. GORDAN Esq.,

the attorney for the APPLTS in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 11

day of OCT., 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Brian Sugden